

ROBERT F. KAHOE, JR.  
Petitioner

vs.

HARFORD COUNTY COUNCIL  
Respondent

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IN THE  
  
CIRCUIT COURT  
  
FOR  
  
HARFORD COUNTY  
  
Case No. 12-C-02-4

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### **MEMORANDUM OPINION AND ORDER**

This matter comes before this court on the petition of Robert F. Kahoe, Jr., People's Counsel, for judicial review of the zoning reclassification decision of the Harford County Board of Appeals in case number 114.

### **PROCEDURAL BACKGROUND**

In a zoning reclassification application filed on December 4, 2000, BLC Properties, Inc. (hereinafter "BLC") requested that its 175.477 acre property (hereinafter "the Property") adjoining Riverside Industrial Park on the south side of Old Philadelphia Road be rezoned from R-3 (Urban Residential) to C-I (Commercial Industrial) based on the fact that a "mistake" had been made during rezoning in 1995. The Harford County Zoning Hearing Examiner heard testimony on the action on April 4, 2001 and issued a written decision in September of the same year. He recommended that the request be approved finding a "mistake" had in fact occurred and that mistake was not corrected during the 1997 comprehensive rezoning process.

In December 2001, the Harford County Council, sitting as the Board of Appeals, adopted the recommendation of the Zoning Hearing Examiner by a vote of 5 to 1.

Robert F. Kahoe, Jr. (hereinafter "Petitioner"), on behalf of the Office of Harford County People's Counsel and opposing neighbors, brought this action for judicial review of the decision of the Board.

### **STANDARD OF REVIEW**

The standard for a judicial entity to apply when reviewing an appeal from a decision of an administrative agency is well settled in Maryland case law.

"Where a legislative body, or a board of county officials, pursuant to authority conferred upon it, has granted a rezoning of the property, the question on judicial review is whether or not such action is arbitrary and discriminatory or fairly debatable." Stratakis v. Beauchamp, 268 Md. 643, 652-53, 304 A.2d 244, 249 (1973). There is also a "strong presumption of the correctness of original zoning and of comprehensive rezoning. To sustain a piecemeal change...strong evidence of mistake in the original zoning or comprehensive

rezoning...must be produced." Id. A court may reverse a zoning agency's action where there is not enough evidence to support that the action was fairly debatable. In other words, if the evidence shows the action was fairly debatable, then the agency's action was not arbitrary and capricious and it may be affirmed by the reviewing court.

### **DISCUSSION**

A brief history of the zoning of the Property is appropriate:

- 1957 The Property was zoned heavy manufacturing.<sup>1</sup>
- 1976 At the owners request, the Property was rezoned R-3 (Residential).
- 1982 Comprehensive Rezoning Plan, Property remained R-3.
- 1989 Comprehensive Rezoning Plan, at the request of BLC, the Property was rezoned to a combination of C-I and G-I (Commercial and General Industrial).
- 1995 At their request, BLC had the Property rezoned for residential use (R-3).
- 1997 Comprehensive Rezoning Plan reaffirmed the R-3 zoning.
- May 1997 McCormick (the adjacent property owner) filed suit against BLC seeking an injunction against residential use of the Property based on covenants that encumbered the Property.
- June 1999 Judge Cypert Whitfill of the Circuit Court for Harford County found that the covenants were valid and BLC was enjoined from any residential use of the Property.
- December 2000 BLC filed a zoning reclassification application to have the Property zoned C-I.
- September 2001 Zoning Hearing examiner recommended the request be approved.
- December 2001 Board of Appeals approved the request.

During the hearing in front of the zoning hearing examiner in 2001, the Applicant (BLC) presented several witnesses who provided testimony regarding the property. Through these witnesses, the Applicant presented evidence of facts that were in existence at the time of the comprehensive rezoning in 1997, but were not considered by the County Council.

The first witness before the Council was Mr. Gregory Szoka, Esquire.<sup>2</sup> Mr. Szoka represented BLC Properties in connection with the injunction sought by McCormick and Company, Inc. He testified that when the property was rezoned to R-3 in 1995, BLC and the Board of Appeals was under the mistaken belief that the property could be developed for residential purposes. Upon the 1997 comprehensive rezoning, the County Council was also under that mistaken belief and reaffirmed the R-3 status. In 1997, McCormick filed the injunction suit

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<sup>1</sup>The present day equivalent to this classification is G-I, General Industrial.

<sup>2</sup>The information provided by the witnesses can be found in the transcript of the meeting of the Harford County Council Members held on November 20, 2001 as well as the hearing Examiner's report of September 12, 2001.

to prevent the residential development based on covenants encumbering the Property and in 1999 Judge Whitfill of Harford County Circuit Court found that the covenants preventing residential use were valid, the Property was forever enjoined from that use.

Mr. James Keefer, a wetlands scientist, also testified at the hearing. One of the issues that caused BLC to seek a rezoning to residential was the delineation of wetlands on the Property. Due to the amount and area of the wetlands on the Property, large warehouse type structures were not feasible buildings to have on the Property and therefore, BLC sought the zoning change. Based on a survey by the Army Corps of Engineers in 1990, 76.6 acres of wetlands were delineated by using the standard manual which was the "Federal Manual for Identification and Delineation of Jurisdictional Wetlands" adopted in 1989. As a result of legislative changes, the use of the 1989 manual became obsolete and a new manual with less restrictive methodologies for delineation came into use and changed the amount of wetlands on the Property. In 1995, after the Board granted the rezoning to residential, the Corps issued a final report on the amount of wetlands on the Property and found that the wetland area decreased by 10 acres. This new delineation allowed the property to become feasible for development for industrial use.

Mr. Timothy Madden testified as an expert in the field of professional planning and landscape architecture. His testimony concerned the Riverside Business Park and the Harford County Master Land Use Plan and stated that development of the Property commercially was in keeping with the general use in the area. Mr. Madden opined that the Hearing Examiner nor the Board of Appeals could have known in 1995 or 1997 about the new wetland delineation nor the restrictive covenants and that these subsequent facts justify the finding of mistake in the zoning.

A professional civil engineer, Mr. Phillip Tolliver, also testified at the hearing. His testimony concerned the feasibility of the development of the Property. He also testified as to the resources BLC committed in the first stages of the residential development,<sup>3</sup> indicating no knowledge that their efforts would be futile and further affirming that there was a mistake.

There were two other witnesses for BLC. Mr. David Scheffenacker is a real estate developer and financier. He testified the Property is suitable for commercial use. Mr. Anthony McClune testified on behalf of the Department of Planning and Zoning and stated that the Department agreed that a mistake was made during the comprehensive rezoning in 1997 and agrees that the Property is suitable for commercial development.

The People's Counsel did not cross-examine any of the witnesses nor did it present any testimony on its behalf.

In its decision, the Board of Appeals found that the Harford County Council relied on mistaken assumptions that the Property could be used for residential purposes and that there were incorrect facts in front of the Council leading them to believe that this was true. The Council had no knowledge of the covenants or the wetland delineation during the comprehensive rezoning in 1997 and if they had that knowledge at the time, they would not have granted the continuation of the R-3 zoning.

In Boyce v. Sembly, 25 Md. App. 43, 334 A.2d 137 (1975), a leading case in Maryland

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<sup>3</sup> BLC filed a preliminary plan approval, secured a record plat and construction plans were submitted to Harford County.

on "mistake" in zoning, the Court of Special Appeals held that "strong evidence of error is required to make the issue of mistake in comprehensive zoning fairly debatable and unless such strong evidence is presented by the applicant, the action of the Board in granting a reclassification is arbitrary and capricious." Id. at 50. Boyce also held that "error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect." Id. at 51.

The Court of Appeals of Maryland, in Howard County, Md. v. Dorsey, 292 Md. 351, 357, 438 A.2d 1339 (1982), differentiated two distinct factual scenarios where a mistake in zoning could be found. The one applicable to this case is enunciated as a mistake is found "where events occurring subsequent to the time of the comprehensive zoning which would show that the Council's assumptions and premises proved erroneous with the passage of time."

In continuing the residential status of zoning during the 1997 comprehensive review, the Council was relying on "assumptions and premises proved erroneous with the passage of time." Specifically, that due to the wetland delineation the Property was unsuitable for commercial use and the belief that the Property was able to be developed residentially. On review, this Court finds that there was ample, strong evidence in front of the Board to warrant the granting of the rezoning application and that their decision to do so was not arbitrary and capricious.

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DATE

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### ORDER

The Circuit Court for Harford Count having reviewed the entire record, heard arguments and issued a Memorandum Opinion, it is this 15 day of Nov, 2002,

**ORDERED** that this court affirms the decision of the Harford County Council sitting as the Board of Appeals in the case number 114.



MAURICE W. BALDWIN, JR., JUDGE

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